

R-8.

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ Date of Decision: 30.08.2012

% FAO (OS) No.442/2008

FOOD CORPORATION OF INDIA Appellant
Through: Mr. P.K. Dey, Mr. N.B. Joshi
and Mr. Kaushik Dey,
Advocates

versus

JAY SHREE SHIPPING Respondent
Through: Mr. Ajay Kumar Gupta, Sr.
Adv. with Mr. Partha Sil,
Advocate

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE VIPIN SANGHI

SANJAY KISHAN KAUL, J. (Oral)

1. The appeal arises from the order dated 01.07.2008 of the learned Single Judge dismissing the objections filed by the appellant under Sections 30 and 33 of the Arbitration Act, 1940 (hereinafter referred to as the said Act) to an unanimous award dated 20.02.1992.

2. The genesis of the disputes is a charter party agreement dated 10.10.1988 executed *inter se* the parties, in terms whereof the

appellant chartered the vessel of the respondent known as M.V. Jaya Laxmi to carry 25,000 metric tonnes ('M.T.') (5% more or less) of wheat in bulk from Portland, USA to one or two safe ports in India, excluding Calcutta. The vessel is stated to have been loaded with 25499.47 M.T. bulk wheat at Portland, sailed on 29.11.1988 and arrived at the discharging port at Nagapattinam on 05.01.1989. The wheat was stated to have been completed discharged on 15.02.1989.

3. Disputes, however, arose *inter se* the parties with regard to a number of issues on account of claims made by the parties, mainly, in relation to lay time calculations and despatch/demurrage, shortage and damage claims and delay in making payments. The agreement, *inter se* the parties contained Clause 42 providing for resolution of disputes through arbitration in accordance with the said Act, which reads as under:

“42. ARBITRATION

All disputes arising under this Charter shall be settled in India in accordance with the provisions of the Arbitration Act, 1940 of India, each party appointing an Arbitrator and the two Arbitrators appointing an Umpire, whose decision, in the event of disagreement between the Arbitrators shall be final and binding upon

both parties hereto. The Arbitrators and the Umpire shall be commercial men”.

The arbitration clause, thus, did not necessarily mandate a reasoned award.

4. The aforesaid arbitration clause was invoked and the parties appointed their arbitrators, who, in turn are stated to have elected an umpire. But in view of the unanimous award dated 20.02.1992, the umpire had really no role to play. The arbitrators appointed by the appellant and the respondent were Rear Admiral Krishan Dev (Retd.) and Mr. T.D. Thomas respectively. It is these two arbitrators who, being experts in the field, have published the unanimous award dated 20.02.1992, albeit there being no reasons for the award recorded therein.

5. The arbitrators have noted the controversy setting out the main claims which have been referred to herein above. Thereafter, they have recorded the facts as to the arrival of the vessel at the loading port; the lay time calculations at the loading port; the lay time allowed for discharge and the claims made by the respondents as well as the counter claims made by the appellant. The matter is thereafter

stated to have been heard and the operative portion of the award is contained in para-11 onwards. The arbitrators stated in para-11 onwards as under:

“11. Now, we, the said Arbitrators, having accepted the responsibility of this arbitration, and having carefully considered the written pleading and documents but before us, and having conferred between ourselves and having agreed one with the other, do hereby make, issue and publish this our joint and agreed AWARD as under in respect of the aforesaid matters put before us.

A. We find and hold that the CHARTERERS are liable to pay to OWNERS –

- (i) Rs.17,708.35 towards Owners’ Loading Port demurrage.*
- (ii) Rs.5,97,201.93 in refund of the same amount deducted by the Charterers while paying ten percent balance freight.*
- (iii) Rs.3,56,284.50 towards Owners’ discharging Port Demurrage*

B. We find and hold that : the OWNERS are liable to pay to CHARTERERS –

Rs.24,051.00 towards port and customers overtime, and cargo damage claims.

C. Accordingly, WE AWARD AND ADJUDICATE that the Charterers pay to the owners without delay the net sum of Rs.9,47,143.78 i.e. Rs.9,47,144/- (Rupees Nine Lakhs Forty Seven Thousand and one hundred forty four only).

D. We further AWARD AND ADJUDICATE that:-

- (i) The Charterers shall pay to the Owners 18 percent per annum interest on the above amount, such interest payment starting after one month from the date of the Award till the payment is made to the owners.*
- (ii) The parties shall bear and pay their own costs of the Arbitration proceedings and charges incidental thereto”.*

6. We have already noticed that not only is there a complete absence of reasons in the award, but also only the final amount due after calculating the amount under different heads has been given.

7. The appellant, aggrieved by this award, preferred objections under Section 30 and 33 of the said Act, which have been dismissed by the impugned order dated 01.07.2008.

8. We are faced with an impugned order, which records reasons. We are also faced with an award which, however, did not record reasons. The result is that the learned Single Judge appears to have supplanted the award with a possible reasoning which could have weighed with the arbitrators while making the award. It is this course of action, which we find impermissible.

9. The learned Single Judge has noticed the pleas advanced on behalf of the appellant qua interpretation of clauses, the effect of certain statutory provisions of the Indian Customs Act, 1962 published Rules - more specifically the Tamil Nadu Minor Ports Harbour Craft Rules, 1953, and the judicial pronouncements in England and in India in this behalf. He also notices the principles as to how lay time is to be calculated, as canvassed by learned counsel for the parties. Thus, the judicial view taken qua methodology of calculations regarding the quantification of the claims under different heads has also been set out.

10. On the conspectus aforesaid, the learned Single Judge has opined that there are two possible interpretations which were canvassed before him, and the interpretation adopted by the learned arbitrators being one of the two plausible interpretations, the same did not require interference by the learned Single Judge.

11. Learned counsel for the appellant has canvassed, before us, that the plausible view stated to have weighed with the learned arbitrators, as canvassed by the respondent, is contrary to the provisions of the Customs Act and the statutory Rules. Thus,

wherever, on a particular aspect, the charter party agreement is silent, the provisions of the Customs Act and the statutory Rules ought to have prevailed. It is his submission that the learned Single Judge fell into an error in ignoring this principle.

12. It is also his submission that there is a contrary legal view of a learned Single Judge of this Court in ***B.K. Vashisht v. East International Limited & Anr.***, 95 (2002) DLT 716. The learned Single Judge, however, accepted the contention of the respondent that this view was based on an earlier judicial pronouncement in England which, in turn, did not hold good, in view of the subsequent pronouncement of the House of Lords, and thus he was free to take a different view. Learned counsel for the appellant thus contends that the principles of *stare decisis* would require that there cannot be *ipso facto* overruling of the view of the learned Single Judge of this Court, merely because the English judicial pronouncement which it had relied upon, stood overruled by a superior Court, and if there was a difference of view, the same ought to have been referred to a larger bench for reconciliation of the two views.

13. Learned counsel for the appellant states that there are other

apparent errors in the reasoning of the learned Single Judge, on which grounds too he has filed the appeal. He, however, fairly concedes that some of the grounds have been specifically set out, while others may not have been so specifically set out. But in view of the general pleas and keeping in mind that some of these aspects may be purely legal in character, he should be permitted to urge even those pleas.

14. We are of the view that the aforesaid would become an academic exercise i.e. to seek reconciliation of the two views of the two learned Single Judge's of this Court, since we are of the view that the learned Single Judge ought not to have gone into a detailed reasoning. The rationale for the same is that if the award itself does not contain reasons, the Court cannot imagine what would have weighed in the mind of the arbitrators or what reasoning would have prevailed for coming to a particular conclusion, while awarding a claim under a specific head. To us, this would be an endeavour to read the minds of the arbitrators, which, in our view, would not be permissible.

15. We are fortified in the view we seek to take by pronouncements of the Hon'ble Supreme Court. In *Arosan*

Enterprises Ltd. v. Union of India and Anr., (1999) 9 SCC 499, it has been observed that no interference is called for in case of a non speaking award, and even in case of a speaking award, unless there is total perversity, the Court cannot permit reappraisal of evidence, and if two views are possible, one taken by the arbitrator cannot be interfered with. It is the latter principle, which appears to have been adopted by the learned Single Judge, while that would be the course open in case of a reasoned award. In case of a non reasoned award, it would not be permissible to adopt a possible line of reasoning, which may have weighed in the mind of the arbitrators. We may only say that the Hon'ble Supreme Court while observing that "*the legislature obviously had in its mind that the arbitrator being the Judge chosen by the parties, the decision of the arbitrator as such ought to be final between the parties*", also observed that reappraisal of evidence by the Court was not permissible. It further added "*In the event of there being no reasons in the award, question of interference of the court would not arise at all*".

16. Similarly, in *Ispat Engineering & Foundry Works, B.S. City Bokara v. Steel Authority of India Limited, B.S. City, Bokaro*, (2001)

6 SCC 347, it has been observed that in case of a non speaking award, it cannot be held that the same is “*otherwise invalid*” on the basis of reappraisal of evidence keeping in mind Section 30(c) of the said Act. Where there was no evidence on record that the umpire had overstepped his jurisdiction or had travelled beyond the agreement between the parties, it was held objections against non speaking award ought not to have been entertained on the ground of being “*otherwise invalid*”.

17. The Hon’ble Supreme Court took note of its earlier decision in *Union of India v. A.L. Rallia Ram*, AIR 1963 SC 1685, wherein it had been observed that the decision of the arbitrator, right or wrong, is binding except in the case of error of law on the face of it, or in the event “*the award itself or in a document actually incorporated in it, there is found some legal proposition which stands out to be the basis of the award and which is erroneous*”. In the present case, a perusal of the award does not disclose that the legal proposition advanced by the appellant or, for that matter, by the respondent forms the basis of the award. Therefore, in our view, there was no occasion for the learned Single Judge or even for us to undertake an academic exercise

to find out as to which of the competing propositions, as advanced by the parties, is correct or erroneous.

18. The Hon'ble Supreme Court has also taken note of the decision in *Jivarajbhai Ujamshi Sheth v. Chintamanrao Balaji*, AIR 1965 SC 214, wherein it has been laid down that it is not open to the Court to speculate, where no reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion and it is not open to the Court to attempt to assess the mental process by which the arbitrator has reached his conclusion where it is not disclosed by the terms of the award.

19. In *D.D. Sharma v. Union of India*, (2004) 5 SCC 325, while dealing with the jurisdiction of the Court under Section 30 of the said Act, qua a non speaking award, it was held that interpretation of a contract was a matter for the arbitrator, even if it gives rise to determination of a question of law and the Courts jurisdiction in this behalf is merely to see whether the arbitrator has exceeded his jurisdiction, and whether there was any bar on the face of the contract, as the jurisdiction to interfere with non speaking award was very limited. The averments in a non speaking award are to be accepted at

face value unless the contrary is proved by a party questioning its validity and thus, where the arbitrator had categorically recorded that he had examined pleadings and evidence submitted by the parties and taken into account the relevant material in a non speaking award, interference with the arbitral award was held to be not justified.

20. If we apply the aforesaid principles to the facts of the present case, it is not possible to conclude from the award as to what principle they have adopted while making their award, as they have not said so. We cannot thus read the mind of the arbitrators as to what weighed with them while awarding the relevant amounts. But they have certainly observed that they have carefully considered the written pleadings and documents and have conferred between themselves and have agreed to the amount being awarded.

21. There is also another aspect of the matter which needs to be noted. The two arbitrators are stated to be experts in the field. Much greater weightage is given to the views of such arbitrators and, that too, when they are unanimous, as they know best the trade practices, and the reason for appointing such experts is that they would take a practical view of the matter. This view finds support from the

pronouncement in *Shri Sunder Lal Khatri v. Delhi Development Authority*, 1994 (2) Arb. LR 479 (Del), where the learned Single Judge of this Court has opined that where there was selection of an arbitrator who was an expert in the field, the intention of the parties was to have an adjudication by an expert in the line and such an award, in any event, should not be interfered with lightly. In adopting this view, the learned Single Judge drew strength from the observations in *M/s. Hind Builders v. Union of India*, (1990) 2 SCR 638.

22. We are, thus, of the view that the impugned award dated 20.02.1992 was not required to be interfered with being a non speaking award by the experts, and the learned Single Judge ought not to have gone into the reasoning of a probable view, which may have weighed with the arbitrators while reaching their conclusion. Thus, the impugned judgment does not have our imprimatur, as that was not an aspect required to be examined by the learned Single Judge.

23. We, thus, dismiss the appeal agreeing with the conclusion of the learned Single Judge, though not for the reasons recorded in the judgment.

24. Parties are left to bear their respective costs.

25. We may, in the end, express deep sense of regret for this prolonged litigation qua an agreement of the year 1988 where a commercial dispute has dragged on for such a long period of time. The appellant, though has deposited the amount, is faced with a situation where the interest element itself is a number of times more than the principal sum awarded. This amount is stated to be deposited in a FDR in pursuance of the order dated 02.12.2008 and has not been withdrawn by the respondent, in view of certain difficulties. The amount lying in the FDR alongwith accrued interest thereon be released to the respondent forthwith.

SANJAY KISHAN KAUL, J

VIPIN SANGHI, J

AUGUST 30, 2012

sr